IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 299 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR. JUSTICE ANANT S DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

BARKAT KANJIBHAI VIRANI

Appearance:

1. Criminal Appeal No. 299 of 1991

Mr. N.D. Gohil, APP for Appellant No.

MR US BRAHMBHATT for Respondent No. 1

MR ND NANAVATI for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR. JUSTICE ANANT S DAVE

Date of decision: 23/02/2005

ORAL JUDGEMENT

(Per : HON'BLE MR. JUSTICE ANANT S DAVE)

1. This appeal is filed by the State of Gujarat under Section 378 of the Code of Criminal Procedure, 1973, against the judgment and order dated 2nd February 1991, passed by the learned Additional Sessions Judge, Vadodara, in Sessions Case No.59 of 1990, whereby, the respondents are acquitted of the offences punishable under Section 20(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('Act' for short).

2. It is the case of the prosecution that, on 4th January 1990, Police Sub-Inspector of North Division, Task Force, Mr. J.M. Panchal, and other police staff were on patrolling and, during the said patrolling, they had received an information that, in the area near Sayaji ganj Police Station, certain persons were indulging into illicit traffic of contraband, namely, opium, and other narcotic drugs. The information so received was conveyed to the Superintendent of Police, "D" Division, and, as per his guidance and advice, one police constable, Mr. Kirankumar Jivanlal, was sent as a bogus customer near Hotel Surya and enquired from one person that he was in need of 3 kg opium and, accordingly, a deal was finalised for 3 kgs of opium and the price thereof was fixed at Rs.6000/- per kg. One of the persons of the said gang selling contraband had accompanied Kirankumar along with the requisite amount near Kamatibaug, at Fine Arts. After half an hour, the said Police Constable, Kirankumar, along with panchas and police went to the said place and, while three persons were, in fact, doing the transaction, the police had apprehended the said three persons and, while doing search of person of accused No.1, Barkat Kanji, from his bush-shirt, two packets each consisting of 500 grams of opium were found in a plastic bag and, out of which, sample of approximately 50 grams opium was taken in a small plastic bag and, thereafter, the said bag was sealed in a match-box. Thereafter, during the search of the person of the second person, who disclosed his name as Mahendra Hemubhai Jadeja, from his bush-shirt, two packets each consisting of 500 grams of opium were found in a plastic bag and, out of which, sample of approximately 50 grams opium was taken in a small plastic bag and, thereafter, the said bag was sealed in a match-box. Thereafter, the third person, who disclosed his name as Ramesh Sambhubhai Kothari was also searched in person and from his bush-shirt, two packets each consisting of 500 grams of opium were found in a plastic bag and, out of which,

sample of approximately 50 grams opium was taken in a small plastic bag and, thereafter, the said bag was sealed in a match-box. The aforesaid three accused persons were asked by the raiding party whether they possessed any pass or permit, to which, the accused persons said 'no'. A panchanama was prepared and the muddamal was also seized. Thereafter, in presence of panchas, all the samples were sealed and sent to the Forensic Science Laboratory for analysis and the report of analyst was obtained. The report indicated that the substance analysed was opium within the meaning of provisions of the Act. On conclusion of the investigation, the respondents were chargesheeted.

3. Since the jurisdiction to try the said case was with the Sessions Court, Vadodara, the learned Chief Judicial Magistrate, Vadodara, committed the case to the Sessions Court by order dated 24th April 1990.

4. The learned Additional Sessions Judge had framed charge against the respondents at Exh.1. The charge was read over and explained to the respondents who had pleaded not guilty to the same and claimed to be tried. The prosecution had, therefore, examined (1) P.W.1. Jayantilal Hiralal Panchal, Exh.19, (2) P.W.2, M.M. Patel, Exh.25, (3), P.W.3, J.K. Joshi, Exh.26 (4) P.W.4, Kirankumar Jivanlal, Exh.27, (5) P.W.5, P.V.Bariya, Exh.29, (6) P.W.6, K.M. Joshi, Exh.30. The prosecution had also produced documentary evidence, such as panchanama of search and seizure, despatch note, FSL report, etc, in support of its case against the respondents.

5 After recording of evidence of prosecution witnesses was over, the learned Judge had explained to the respondents the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. In their further statements, the case of the respondents was that a false case was foisted upon them by the police. In order to substantiate their claim, the respondents Nos.1, 2 and 3 had examined themselves at Exh.6, Exh.7 and Exh.8 respectively.

6. On appreciation of evidence adduced by the parties and after hearing the learned advocates for the parties, the trial court did not believe the case of the prosecution and came to the conclusion that there was failure to comply with the mandatory requirements under Sections 42, 43, 59 and 53 of the Act, since nothing was

found from the record that the said procedure was followed by the prosecution. The learned Judge has also relied on the judgment of this Court in the case of Surajmal Kanaiyalal Soni vs. State of Gujarat, reported in 1990 (2) GLR p.923, where, this court has laid down the law with regard to compliance of mandatory requirements, and held that if defence can establish any prejudice being caused by not following such requirement of the mandatory provisions, the Court can draw an inference and give benefit of doubt to the accused. The learned Judge has accepted the defence of the respondents about the discrepancies in the procedure followed by the prosecution right from apprehending the accused and drawing the panchanama, while sealing the muddamal, and following the procedure under Section 50 of the Act while searching persons of the accused, the discrepancy in the despatch register and date as received by the FSL Authority, and even a sizable difference of weight of sample drawn from the muddamal articles. In view of the abovereferred to material discrepancies, the learned Judge held that the respondents-accused are entitled to benefit of a reasonable doubt and, accordingly, acquitted the respondents by the judgment and order dated 2nd February 1991, giving rise to the present appeal.

7. Learned Additional Public Prosecutor, Mr. N.D. Gohil, has contended that the respondents had committed offence punishable under Section 20(b) of the Act as they were found in dealing and selling the contraband, namely, opium, a prohibited substance. He has submitted that P.W.4, Kirankumar Jivalal, Exh.27, had deposed that he had entered into a deal with the respondents-accused and they had supplied the contraband item and at that point of time they were caught red-handed. According to him, the evidence of Police Constable stands corroborated by other contemporary documentary evidence on record and, therefore, the respondents ought to have been convicted of the offences with which they were charged. The learned APP has submitted that the requisite procedure was followed by the prosecution as envisaged under Sections 42, 43, and 57 of the Act. He has, lastly, submitted that, since the offence was against the Society at large, the respondents ought to have been convicted of the offences punishable under Section 20(B) of the Act.

8. The learned advocates appearing for the respondents submitted that police constable, Mr. Kirankumar Jivanlal, who was sent as a bogus customer, had not got himself searched in presence of panchas. It is further submitted that the place of incident was a residential area and other such persons were available

and, therefore, there was no reason to select a police personnel as a decoy customer. It is submitted that the deposition of P.W.1. Jayantilal Hiralal Panchal, Exh.19, and the deposition of P.W.4, Kirankumar Jivalal, Exh.27, are contradictory to each other. P.W.1, Panchal, had stated that Kirankumar had not gone on a motor-cycle whereas P.W.4, Kirankumar, had stated that he had gone at the place of incident on a motor-cycle. Other contradictions were also reflected in the depositions of prosecution witnesses and even the panchas, P.W.2, M.M. Patel, Exh.25, P.W.3, J.K. Joshi, Exh.26, have turned hostile and they have not supported the case of the prosecution. Even there is a lacuna noticeable in sealing the muddamal and there are other discrepancies with regard to weight of muddamal which was submitted by the PSO to the FSL and the report received from the FSL. There was sizable difference in the weight of the muddamal article. According the prosecution, they had drawn the sample of 50 grams of opium each from three accused whereas the muddamal examined by the FSL was only 7.563 grams, 7.950 grams and 6.095 grams, respectively. Not only that, even the despatch note does bear certain discrepancies with regard to date and despatch number. It is further submitted that the muddamal, which was seized and sealed by the police, was not the same which was received and analyzed by the FSL. Even though the said muddamal had passed through various hands, such persons were not examined. It is further submitted that the prosecution has failed to comply with the mandatory requirements of Sections 42, 43 and 50 of the Act. In support of their submissions, the learned advocates for the respondents relied upon the judgments in the cases of Bhanu Lal Das and others vs. State of Tripura, reported in AIR 1958 Tripura 40, and the State of Rajasthan vs. Daulat Ram, reported in AIR 1980 Supreme Court 1314. In view of the above, the learned advocates for the respondents have submitted that the learned Judge has rightly acquitted the respondents by giving benefit of doubt and the appeal deserves to be dismissed.

9. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence with reference to broad and reasonable probabilities of the case. From the record, it is apparent that there are discrepancies with regard to weight of muddamal which was submitted by the PSO to the FSL and the report received from the FSL. There was also sizable difference in the weight of the muddamal article. According the prosecution, they had drawn the sample of 50 grams of opium each from three accused whereas the muddamal examined by the FSL was only 7.563

grams, 7.950 grams and 6.095 grams, respectively. Not only that, even the despatch note shows certain discrepancies with regard to date and despatch number. Under the circumstances, a question arises whether the substance which was found from the possession of the respondents was analysed by the FSL or any other substance. Somewhere some bungling had taken place which is not explained by the prosecution at all. On appreciation of evidence, this Court is of the view that no cogent and reliable evidence has been adduced by the prosecution to establish that the substance which was found and recovered from the possession of the respondents was analysed by the FSL.

10. Further, where the samples of opium changed several hands before reaching the public analyst and yet none of those in whose custody the samples remained was examined by the prosecution to prove that while in their custody the seals on the samples were not tampered with, the inevitable effect of the omission was that the prosecution failed to rule out the possibility of the samples being changed or tampered with during the period in question. Hence, it cannot be said that the prosecution has proved all the links starting from the seizure of the samples till the same reached the hands of the Public Analyst.

11. In the light of the abovereferred to glaring material discrepancies appearing in the evidence of the prosecution case, a reasonable doubt is created about the case of the prosecution that the substance found from the possession of the respondents was analysed and on analysis it was found to be opium.

12. After analysing, sifting and assessing the evidence on record with particular reference to its trustworthiness and truthfulness by a process of dispassionate judicial scrutiny, this Court finds that other contradictions were also reflected in the depositions of prosecution witnesses and even the panchas, P.W.2, M.M. Patel, Exh.25, P.W.3, J.K. Joshi, Exh.26, have turned hostile and they have not supported the case of the prosecution. The material discrepancies appearing in the prosecution case have not been explained by any of the prosecution witnesses and, therefore, the respondents are entitled to benefit of a reasonable doubt. Therefore, acquittal of the respondents can hardly be regarded as illegal or erroneous.

13. This is an acquittal appeal in which the Court would be slow to interfere with the order of acquittal.

Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned trial judge who had opportunity to observe demeanour of the witnesses. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned trial judge for acquitting the respondents. Suffice it to say that the learned trial judge has given cogent and convincing reasons for acquitting the respondents. As this Court is in general agreement with the view expressed by the learned trial judge, the Court does not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned trial judge and this Court is of the opinion that expression of general agreement with the view taken by the learned trial judge would be sufficient in the facts of the case. The learned Additional Public Prosecutor has failed to convince this Court to take a view contrary to the one already taken by the learned trial judge. This Court is in full agreement with the finding of the learned trial judge that there was total non-observance of mandatory requirements of Sections 42, 43 and 50 of the Act and, therefore, no other view can be taken by this Court, except to confirm the acquittal. .

14. In the result, the appeal fails and is dismissed. Muddamal to be disposed of in terms of the directions given by the learned Judge in the judgment impugned in the appeal.

(R.P. Dholakia, J.)

(Anant S. Dave, J.)

(swamy)